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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARC LAMBERTON, JEAN-JACQUES LEGOLL, PASCAL THUBERT, ERIC LEVY-ABEGNOLI, and PIERRE SECONDO

Appeal 2009-008951
Application 09/654,857
Technology Center 2400

Before HOWARD B. BLANKENSHIP, ALLEN R. MacDONALD, and JOHN A. JEFFERY, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

DECISION ON APPEAL[1]

This appeal returns to us following our remand of July 24, 2007, where we asked the Examiner to clarify the record regarding whether the Examiner entered Appellants' evidence presented for the first time in the

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appeal Brief establishing common assignment to disqualify the cited Banavar reference in connection with the Examiner's obviousness rejection of claims 5, 10, and 15. *See Ex parte Lamberton*, No. 2007-1356 (BPAI 2007) ("Remand").

In response to our remand, the Examiner mailed an Examiner's Answer on September 5, 2007 that is said to replace the previous Answer. Ans. 1.[2] In the latest Answer, the Examiner indicates that Appellants' submitted evidence regarding Banavar's common assignment "is not entered as a matter of right" (Ans. 13)—a statement that we presume means that the Examiner did not enter this evidence. Appellants also filed a Reply Brief on October 27, 2007 responsive to the latest Examiner's Answer.

In view of these responses, the present appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-15 is now ripe for decision. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part.

STATEMENT OF THE CASE

Appellants' invention relates to gateways and proxies used by Internet Service Providers and enterprise network administrators at the boundary of their networks. *See generally* Spec. 6-7. Claim 1 is illustrative:

> 1. In a client-server environment, a method for providing transparency in a gateway of a IP network comprising the steps of:

[2] Throughout this opinion, we refer to (1) the Appeal Brief filed September 13, 2006; (2) the Examiner's Answer mailed September 5, 2007 (which replaces the earlier Examiner's Answer mailed Dec. 7, 2006); and (3) the Reply Brief filed October 27, 2007 (which is substantially the same as the earlier Reply Brief filed February 6, 2007).

interrogating a directory comprising proxy server protocol data specific to every end-user network account of said IP network;

retrieving parameters associated with said proxy server protocol data for a first end-user in response to an access request from a client application of said first end-user;

accessing an application server on behalf of said client application in accordance with said retrieved parameters for said first end-user; and

relaying data between said client application and said application server.

The Examiner relies on the following as evidence of unpatentability:

Aravamudan	US 6,301,609 B1	Oct. 9, 2001 (filed Sept. 8, 1999)
Ganguly	US 2003/0212863 A1	Nov. 13, 2003 (eff. filed Sept. 20, 1999)
Banavar	US 6,662,206 B1	Dec. 9, 2003 (filed May 28, 1999)

THE REJECTIONS

1. The Examiner rejected claims 1, 2, 4, 6, 7, 9, 11, 12, and 14 under 35 U.S.C. § 102(e) as anticipated by Ganguly. Ans. 3-5.
2. The Examiner rejected claims 3, 8, and 13 under 35 U.S.C. § 103(a) as unpatentable over Ganguly and Aravamudan. Ans. 6-7.
3. The Examiner rejected claims 5, 10, and 15 under 35 U.S.C. § 103(a) as unpatentable over Ganguly and Banavar. Ans. 7-8.

THE ANTICIPATION REJECTION

Regarding representative claim 1, the Examiner finds that Ganguly discloses every recited feature including interrogating a directory comprising

"proxy server protocol data" that is specific to every end-user account. Ans. 3-4, 9-10. In this regard, the Examiner refers to Ganguly's proxy server functionality and associated backend configuration table 900. *Id.* The Examiner also finds that Ganguly's query translation functionality (1) retrieves parameters associated with the proxy server protocol data for a first end-user responsive to an access request, and (2) accesses an application server on behalf of a client application in accordance with the retrieved parameters as claimed. *Id.*

Appellants argue that Ganguly does not interrogate a directory comprising proxy server protocol data specific to every end-user network account as claimed. App. Br. 5-6; Reply Br. 2-3. Although Appellants acknowledge that Ganguly queries a lightweight directory access protocol (LDAP) [3] server for stored data, Appellants contend that the LDAP server does not include protocol data, let alone protocol data specific to every end-user account as claimed. Reply Br. 2-3.

Appellants also argue that Ganguly does not retrieve parameters associated with the proxy server protocol data for a first end-user responsive to an access request as claimed. App. Br. 6-8; Reply Br. 3-5. According to Appellants, the data stored in Ganguly's configuration table 900 are not parameters associated with the proxy server protocol data. App. Br. 6-8. Appellants add that Ganguly does not access an application server on behalf of a client application in accordance with the retrieved parameters as claimed. App. Br. 8-9.

[3] *See, e.g.,* Ganguly, ¶ 0036 (defining LDAP).

Appellants also argue that Ganguly does not create, in the IP network gateway, a directory including entries specific to every end-user network account as recited in claim 2 (App. Br. 9-10; Reply Br. 5-7). Regarding representative claim 4, Appellants contend that Ganguly does not disclose the recited parameter-retrieval steps, namely (1) obtaining "leading data" from the client application; (2) parsing this "leading data"; (3) determining the protocol that the client application currently uses; (4) interrogating the directory at an entry corresponding to the first end-user; (5) retrieving parameters associated with the protocol; and (6) executing the protocol in accordance with those parameters. The issues before us, then, are as follows:

ISSUES

Under § 102, has the Examiner erred by finding that Ganguly:

(1)(a) interrogates a directory comprising proxy server protocol data specific to every end-user network account; (b) retrieves parameters associated with the proxy server protocol data for a first end-user responsive to an access request; and (c) accesses an application server on behalf of a client application in accordance with the retrieved parameters as recited in claim 1?

(2) creates, in the IP network gateway, a directory including entries specific to every end-user network account as recited in claim 2?

(3) retrieves parameters by (a) obtaining "leading data" from the client application; (b) parsing this "leading data"; (c) determining the protocol that the client application currently uses; (d) interrogating the directory at an

entry corresponding to the first end-user; (e) retrieving parameters associated with the protocol; and (f) executing the protocol in accordance with those parameters as recited in claim 4?

FINDINGS OF FACT (FF)

1. Ganguly discloses a directory proxy caching system that is constructed based on a "predicate" that is formed by a query (request) from a client. Once data is found in the directory, the data is (1) stored in a cache of a proxy server, and (2) indexed in the proxy server by the predicate. Ganguly, Abstract; ¶ 0030.

2. To this end, the data stream format of a client request according to a conventional protocol (e.g., LDAP protocol) is translated by a predicate proxy core 300 of a proxy cache server 200 to a "searching probe" or "predicate" that is used to efficiently search and access data stored in the proxy cache server's cache. If the data is unavailable in the proxy cache, the predicate proxy core generates another request (e.g., using LDAP protocol) to retrieve the data from a remote server. The data is then stored on the proxy server and forwarded to the client. Ganguly, ¶¶ 0030-31, 0039-41; Fig. 2.

3. Ganguly's predicate proxy core 300 includes (1) protocol handler 304 that deals with LDAP/NDAP[4] specific marshalling and un-marshalling of arguments to/from the network, and (2) predicate logic 310. The predicate logic (1) receives a conventional LDAP data stream protocol format; (2) transforms it into a predicate probe used to search its internal

[4] NDAP stands for "Novell Directory Access Protocol." Ganguly, ¶ 0037.

cache; and (3) if the data is not present, generates another LDAP request that is sent to the LDAP and/or NDS servers to acquire and cache more specific data content. Ganguly, ¶¶ 0045, 0057, 0067; Fig. 3.

4. Ganguly's predicate logic handles equivalent forms between LDAP/NDAP search filter expressions and SQL so that the system works for a variety of protocols. Ganguly, ¶ 0063.

5. Ganguly's Figure 5 shows a directory service 500 that services LDAP and NDAP clients 502, 506. The LDAP and NDAP clients submit queries to their respective proxy interfaces 504, 508 which, in turn, (1) arrange their respective queries into a common format, and (2) hand those common-format queries to predicate proxy core 510. The predicate proxy core then generates a request to either the LDAP server 520 or NDS server 522 using their respective formats. In either event, the predicate proxy core maintains a cache indexed by predicates submitted by either LDAP or NDAP clients. Ganguly, ¶ 0068; Fig. 5.

6. Ganguly's predicate caching directory proxy server acts as a proxy to multiple backend LDAP servers. To this end, the proxy server has a table with entries showing the range of predicate values held by each LDAP server. By comparing the client predicates with the entries in the table (i.e., the "initiating points" of the backend servers), the proxy server determines which LDAP servers to send the inquiry to. Ganguly, ¶¶ 0100-03, 0126-27; Fig. 10.

7. Ganguly's system uses a backend configuration table 900 which includes fields for (1) the IP address of the specific backend (column 904, "backendaddress#"); (2) the "initiating point" of the directory tree hosted by

this particular backend (column 906); and (3) the IP address of the LDAP backend server (column 908). Ganguly, ¶¶ 0105-25; Fig. 9.

8. Ganguly notes that companies typically configure their directory servers such that each server stores a subset of data types. For example, a company may have two LDAP servers (Server A and B) where (1) all corporate human resource-related information (employee IDs, email and residential addresses, emergency contacts, salaries, etc.) are stored on LDAP Server A, and (2) all corporate research and development work is stored on LDAP Server B. Ganguly, ¶ 0013.

9. According to Appellants' Specification, "[t]he leading part of the application data, which contains the headers of the protocols in use, can thus be examined and parsed to retrieve, through a further interrogation of the directory [376], all information necessary to process the application data and application protocols used." Spec. 12:6-9.

ANALYSIS

Claims 1, 6, and 11

Based on the record before us, we find no error in the Examiner's anticipation rejection of representative claim 1. We note at the outset that merely reciting "proxy server protocol data specific to every end-user network account of [the] IP network" constitutes non-functional descriptive material as it does not further limit the claimed invention functionally. Such

non-functional descriptive material does not patentably distinguish over prior art that otherwise renders the claims unpatentable.[5]

Nevertheless, we agree with the Examiner (Ans. 9-10) that the scope and breadth of claim 1 does not preclude the functionality of Ganguly's predicate-based proxy caching system. We reach this conclusion noting that Ganguly's system, via a protocol handler and predicate logic, transforms received client queries using a conventional protocol (e.g., LDAP protocol) to a "searching probe" or "predicate" that is used to efficiently search and access data stored in the proxy cache server's cache. FF 2-3. If the data is unavailable in the proxy cache, the predicate proxy core generates another request (e.g., using LDAP protocol) to retrieve the data from a remote server. *Id.* Notably, this system works for multiple protocols. FF 4. In one implementation, LDAP and NDAP clients submit queries in diverse protocols (e.g., LDAP, NDAP) to respective proxy interfaces which, in turn, (1) arrange their respective queries into a common format, and (2) hand those common-format queries to a predicate proxy core. FF 5. The predicate proxy core then generates a request to either the LDAP server or NDS server using their respective formats. *Id.*

To achieve this protocol conversion functionality responsive to user queries, Ganguly's system would "interrogate" a data store (i.e., "directory") containing "proxy server protocol data" (e.g., LDAP and NDAP protocol information). Since at least some of this protocol information is at least

[5] *See In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004); *see also Ex parte Nehls*, 88 USPQ2d 1883, 1887-89 (BPAI 2008) (precedential) (discussing cases pertaining to non-functional descriptive material).

related to *all* human resource-related information of an enterprise (*see* FF 8) as the Examiner indicates (Ans. 10), the proxy server protocol data would therefore be "specific" to every end-user account as claimed.

And as the Examiner indicates (*id.*), Ganguly's predicate-based system would (1) retrieve parameters associated with this proxy server protocol data in connection with a particular client's query (request) and its corresponding protocol (e.g., LDAP), and (2) access an application server on behalf of that client in accordance with those retrieved parameters. *See* FF 1-5. By (1) determining the particular protocol of a received client query; (2) constructing a search for cached data; and (3) generating other requests using a protocol commensurate with that of the received query would involve retrieving at least some parameters associated with the protocol data, and accessing a server in accordance with those parameters as claimed. *See id.* In any event, that Ganguly's system can select a particular server by comparing client predicates with the entries in a table (i.e., parameters indicating the "initiating points" of LDAP backend servers) that are at least associated with proxy server protocol data (e.g., LDAP protocol information) (FF 6-7) only bolsters our conclusion that Ganguly amply discloses these recited features given their scope and breadth. Appellants' arguments (App. Br. 5-9; Reply Br. 2-3) are simply not commensurate with the scope of the claim.

We are therefore not persuaded that the Examiner erred in rejecting representative claim 1, and claims 6 and 11 not separately argued.

Claims 2, 7, and 12

We will also sustain the Examiner's rejection of representative claim 2 which calls for creating, in the IP network gateway, a directory including entries specific to every end-user network account. As noted previously, nothing in the claim precludes the "created" data store (i.e., "directory") containing "proxy server protocol data" (e.g., LDAP and NDAP protocol information) in connection with Ganguly's predicate-based functionality that, among other things, performs protocol-specific operations and conversions responsive to user queries. *See* FF 1-5. And while the recited entries being specific to every end-user network account constitutes non-functional descriptive material as noted previously, we nevertheless note that at least some of this protocol information is at least related to *all* human resource-related information of an enterprise (*see* FF 8) as the Examiner indicates (Ans. 11). Appellants' arguments (App. Br. 9-10; Reply Br. 5-7) are simply not commensurate with the scope of the claim.

We are therefore not persuaded that the Examiner erred in rejecting representative claim 2, and claims 7 and 12 not separately argued.

Claims 4, 9, and 14

We will also sustain the Examiner's rejection of representative claim 4 which recites that retrieving parameters includes (1) obtaining "leading data" from the client application; (2) parsing this "leading data"; (3) determining the protocol that the client application currently uses; (4) interrogating the directory at an entry corresponding to the first end-user; (5) retrieving parameters associated with the protocol; and (6) executing the protocol in accordance with those parameters.

Despite Appellants' contention that Ganguly does not obtain "leading data" from a client application as claimed, let alone parse this data (App. Br. 10-11; Reply Br. 10), we note that Appellants have not pointed to any definition of the term "leading data" in the Specification to limit its interpretation to such a definition. Although Appellants' Specification discusses parsing the "leading part" of the application data containing the headers of the protocols in use (FF 9), we decline to import this description into the claim, but rather construe the term with its broadest reasonable interpretation.[6]

Given the scope and breadth of the term "leading data," we find no error in the Examiner's position (Ans. 12-13) that by analyzing a received client request to determine its particular protocol would involve obtaining and parsing *at least* "leading data" to achieve that end. *See* FF 1-7. Even assuming, without deciding, that the recited "leading data" does not constitute all received data associated with the entire request, Ganguly would still meet the disputed limitations, for the data that was analyzed to determine the query's protocol for (1) constructing an associated cache search, and (2) generating related queries would involve parsing at least some "leading data" associated with the query. *See id.* To the extent that

[6] During patent examination, claims are given their broadest reasonable interpretation in light of the Specification as it would be interpreted by skilled artisans. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) (citations omitted). This interpretation, however, must not import limitations from the Specification into the claims. *See id.* at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments. . . . [C]laims may embrace different subject matter than is illustrated in the specific embodiments in the specification.") (citations and internal quotation marks omitted).

Appellants' argument is based on the notion that "leading data" must contain headers is simply not commensurate with scope of the claim. Nor does the claim specify how the client application's protocol is determined—a limitation fully met by Ganguly's protocol-specific proxy server functionality noted previously. *See id.*

Nor do we find error in the Examiner's position (Ans. 5) that Ganguly's proxy server functionality would interrogate the directory at an entry corresponding to the first end-user as claimed. As we noted previously, to achieve this protocol conversion functionality responsive to user queries, Ganguly's system would "interrogate" a data store (i.e., "directory") containing "proxy server protocol data" (e.g., LDAP and NDAP protocol information). *See* FF 1-5. Since this functionality is responsive to a particular user's query (which has a particular protocol) (*see id.*), the corresponding directory interrogation would be at an entry corresponding to that user. Likewise, Ganguly's selecting a particular server by comparing client predicates with the entries in a table (i.e., parameters indicating the "initiating points" of LDAP backend servers) that are at least associated with proxy server protocol data (e.g., LDAP protocol information) (FF 6-7) would likewise involve a directory interrogation responsive to a particular user's query. That is, the directory would be interrogated at an entry corresponding to that user.

And as noted previously, by (1) determining the particular protocol of a received client query; (2) constructing a search for cached data; and (3) generating other requests using a protocol commensurate with that of the received query would involve retrieving at least some parameters associated

with the protocol data, and accessing a server in accordance with those parameters as claimed. *See* FF 1-7. Nothing in the claim precludes this server access as corresponding to the recited protocol execution.

We are therefore not persuaded that the Examiner erred in rejecting representative claim 4, and claims 9 and 14 not separately argued.

THE OBVIOUSNESS REJECTION OVER GANGULY AND ARAVAMUDAN

Regarding claim 3, the Examiner finds that Ganguly discloses every recited feature except (1) the end-users' entries comprise dynamic parameters; (2) enabling entries for end-users that connect; and (3) disabling entries for end-users that disconnect as claimed. Ans. 6-7. The Examiner, however, cites Aravamudan for teaching these features in concluding that the claim would have been obvious. Ans. 6-7, 11-12.

Appellants argue that Ganguly and Aravamudan collectively fail to teach or suggest updating the directory of end users in the network gateway, where updating includes (1) disabling entries for end-users that disconnect; (2) enabling entries for end-users that connect; and (3) updating the end-users' entries comprising dynamic parameters whenever the parameters are changing while connected as claimed. App. Br. 13-15. Appellants add that there is no reason to modify Ganguly's directory indexing system with the teachings of Aravamudan as the Examiner proposes. App. Br. 15-18; Reply Br. 7-9. The issues before us, then, are as follows:

ISSUES

1. Under § 103, has the Examiner erred in rejecting claim 3 by finding that Ganguly and Aravamudan collectively would have taught or suggested updating the directory of end users in the network gateway, where updating includes (a) disabling entries for end-users that disconnect; (b) enabling entries for end-users that connect; and (c) updating the end-users' entries comprising dynamic parameters whenever the parameters are changing while connected?

2. Is the Examiner's reason to combine the teachings of these references supported by articulated reasoning with some rational underpinning to justify the Examiner's obviousness conclusion?

ADDITIONAL FINDINGS OF FACT

10. Aravamudan's system assigns associate (buddy) priorities for user-definable instant messaging (IM) buddy groups. If an associate is assigned a low priority, the associate will never discern if the user is online or offline and interact with the user via the user's proxy. But if an associate is assigned a high priority, the associate will discern the user's online status any time he is registered online. Aravamudan, Abstract; col. 2, ll. 25-49.

11. Aravamudan's system monitors user interaction with client premises equipment (CPE) and relays changes in state to a server. If no activity is detected for a predetermined time period, the database is updated to reflect that the user is inactive. Also, the IM server periodically polls the CPE to determine whether a network session has been terminated. If so, the user is registered as offline. Aravamudan, col. 7, l. 41 – col. 8, l. 31; Figs. 6-7.

ANALYSIS

We will not sustain the Examiner's rejection of claim 3 essentially for the reasons indicated by Appellants (App. Br. 13-18; Reply Br. 7-9). Aravamudan's instant messaging system updates a database to reflect users' online status—an online status that is affected by a particular user priority as the Examiner indicates (Ans. 11-12; FF 10-11). Even assuming, without deciding, that Aravamudan's status updating features cure Ganguly's acknowledged deficiencies regarding claim 3, we still see no reason why skilled artisans would have employed such a status update system for instant messaging in Ganguly's predicate indexing system for caching data to serve client requests—a completely different type of system. *Compare* FF 1-8 *with* FF 10-11.

Although the Examiner alleges that such a combination would "ensur[e] that replies to requests are sent to clients with an active connection[,]" (Ans. 12), to incorporate Aravamudan's status monitoring system for instant messaging purposes in Ganguly's data indexing and caching system—a completely different type of application—simply strains reasonable limits as Appellants indicate (Reply Br. 15-18). In short, combining these references together to arrive at the claimed invention as the Examiner proposes is tantamount to impermissible hindsight reconstruction of the invention using Appellants' own disclosure as a blueprint.[7] We

[7] "It is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious . . . ." *In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992).

therefore find the Examiner's reason to combine the teachings of these references is not supported by articulated reasoning with some rational underpinning to justify the Examiner's obviousness conclusion.

We are therefore persuaded that the Examiner erred in rejecting claim 3, and claims 8 and 13 which recite commensurate limitations.

THE OBVIOUSNESS REJECTION OVER GANGULY AND BANAVAR

Regarding claim 5, the Examiner finds that Ganguly discloses every recited feature except for informing the end-user that a server application is unavailable if a link to the application is not established. Ans. 7-8. The Examiner, however, cites Banavar as teaching this feature in concluding that the claim would have been obvious. *Id.*

Appellants argue that Banavar does not qualify as prior art under 35 U.S.C. § 103(c) in view of evidence submitted for the first time in the Appeal Brief that Banavar and the claimed invention were commonly assigned at the time the invention was made. App. Br. 19; Reply Br. 12. The Examiner, however, did not enter this evidence. *See* Ans. 13 ("This evidence is not entered as a matter of right."). The issue before us, then, is as follows:

ISSUE

Under § 103, has the Examiner erred in rejecting claim 5 by finding that Ganguly and Aravamudan collectively would have taught or suggested informing the end-user that a server application is unavailable if a link to the application is not established. This issue turns on whether Appellants have shown that Banavar does not qualify as prior art under § 103(c).

ANALYSIS

We will sustain the Examiner's rejection of representative claim 5. Although Appellants argue that Banavar does not qualify as prior art under § 103(c) since it was commonly assigned at the time of the invention (App. Br. 19; Reply Br. 12), as we noted in our remand, the requisite evidence establishing this common assignment was presented on this record for the first time in the Appeal Brief filed June 29, 2006. Remand, at 3. Notably, however, such newly-submitted evidence—like all other evidence submitted for the first time after filing an appeal—is not entered as a matter of right as we noted previously. Remand, at 3-4 (citing 37 C.F.R. § 41.33(d)). *Accord* Ans. 13.

Since the Examiner indicates that this evidence was not entered as a matter of right (*id.*) responsive to our remand to clarify this very point, we presume that the Examiner did not enter this evidence. Accordingly, Appellants' arguments regarding the alleged disqualification of Banavar as prior art under § 103(c) are inapposite.

And as we noted in our remand, we likewise find unavailing Appellants' untimely alternative argument to the § 103(c) argument—an argument that was presented for the first time in the Reply Brief. *Compare* App. Br. 18-19 *with* Reply Br. 12-13. Such belated arguments, however, are waived, and we decline to address them here. *See Ex parte Borden*, 93 USPQ2d 1473, 1474 (BPAI 2010) (informative) ("[T]he reply brief [is not] an opportunity to make arguments that could have been made in the principal brief on appeal to rebut the Examiner's rejections, but were not.").

We are therefore not persuaded that the Examiner erred in rejecting representative claim 5, and claims 10 and 15 not separately argued.

CONCLUSION

The Examiner did not err in rejecting claims 1, 2, 4, 6, 7, 9, 11, 12, and 14 under § 102, and (2) claims 5, 10, and 15 under § 103. The Examiner, however, erred in rejecting claims 3, 8, and 13 under § 103.

ORDER

The Examiner's decision rejecting claims 1-15 is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

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